IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1809

SEDALIA-MARSHALL-BOONVILLE STAGE LINE, INC.,
Petitioner,

v.

NATIONAL MEDIATION BOARD

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

MOTION OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE

(Air New England, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Hughes Airwest, National Airlines, Inc., New York Airways, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Reeve Aleutian Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Airlines, Inc., Western Air Lines, Inc., and Wien Air Alaska, Inc.)

AND BRANIFF INTERNATIONAL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND BRANIFF INTERNATIONAL AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MOTION OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND BRANIFF INTERNATIONAL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42 of this Court, Airline Industrial Relations Conference ("AIR Conference") and Braniff International, hereby respectfully move for leave to file the attached brief as *amici curiae* in this case in support of the petition for certiorari. The attorney for the petitioner and the attorney for the respondent National Mediation Board have consented to such filing. The consent of the attorney

for the respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was requested but refused.

AIR Conference, its member air carriers and Braniff International are vitally concerned that the National Mediation Board should fulfill statutory and constitutional requirements in conducting representation proceedings to determine whether airline employees are to be represented by unions, the basic issue presented by the petition for writ of certiorari. The *amici* brief supplements the parties' briefs by presenting the reasons why certiorari should be granted in view of the extensive experience of these carriers with National Mediation Board representation proceedings and the substantial impact of their results on the carriers' operations.

Respectfully submitted,

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Attorney for Airline Industrial Relations Conference and Braniff International

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THE INTEREST OF THE AMICI CURIAE

In this case, as appears from the briefs of the petitioner and respondent heretofore filed, the National Mediation Board (the "Board" or "NMB") treated as ineligible to

vote in a representation election in the craft or class of pilots and co-pilots three persons identified as pilots by their air carrier employer. The record of what the Board did demonstrates both an absence of evidence on which the Board's determination was based and a lack of concern for the interests of the carrier.[1]

Airline Industrial Relations Conference ("AIR Conference"), comprising a large part of the United States airline industry,[2] and Braniff International are concerned that carriers not be made to suffer the "unilateral and arbitrary imposition of a union" on them, which the Court of Appeals for the Eighth Circuit said lay within the power of the National Mediation Board to do. AIR Conference and Braniff, therefore, urge this Court to grant the petition herein to review the determination of the Court of Appeals for the Eighth Circuit that the NMB discharged its duty to investigate and its determination that the carrier has no constitutional right to notice of the issues being

1. In its post-election response to the carrier's objections to the Board's eligibility determinations, the Board said that "as a matter of *courtesy* the Board may consider the position of a carrier . . ." (R. 44; emphasis added)

2. AIR Conference is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters, and to represent the member carriers with respect to legislative, judicial and administrative matters in those areas in the airline industry. See *Airline Dispatchers Ass'n* v. *CAB*, 506 F.2d 1321 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 988 (1975). Its present members include: Air New England, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Hughes Airwest, National Airlines, Inc., New York Airways, Inc., North Central Airlines, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Airlines, Reeve Aleutian Airways, Inc., Texas International Airlines, Inc., Trans World Airlines, Inc., United Arlines, Inc., Western Air Lines, Inc., and Wien Air Alaska, Inc.

considered by the Board nor to an opportunity to be heard on those issues.

These serious statutory and constitutional issues are presented by undisputed facts. Upon application by the respondent International Brotherhood of Teamsters ("IBT") to represent pilots and co-pilots of the petitioner Sedalia-Marshall-Boonville Stage Line, Inc. ("SMB"), the Board requested a list of pilot and co-pilot employees from the carrier. Such a list was delivered; the Mediator discussed with the carrier the eligibility of two employees and ruled that they were mechanics. Thereafter, the carrier submitted a revised list omitting the names of those two employees. During the election period, the Board notified SMB that two employees on the revised list had been ruled ineligible.

The Board asked for no information from the carrier regarding three other employees, Barber, Milner, and Worden, whose names appeared on the revised list, and did not notify the carrier before the election that those three persons were ineligible to vote. Since the union won the election by one vote, obviously the votes of those three or any one of them could have changed the result of the election.

After the election, the carrier learned for the first time that Barber, Milner, and Worden had been ruled ineligible to vote as pilots. In response to the carrier's inquiry, the Board stated only that it had found that two of them were assistants to the Chief Pilot (and therefore presumably supervisory or managerial) and that the third performed non-pilot duties. At no time did the Board make any state-

ment or disclosure of the alleged evidence on which these findings, announced for the first time after the election, were made. There is nothing in the record to show that the Board received any evidence of the duties of these three men before the election.

QUESTION PRESENTED

Did the determination of the National Mediation Board that three employees were ineligible to vote in a representation election, with no record evidence of any facts underlying that finding and without notice to the carrier employer that their eligibility was in issue so that there was no opportunity for the carrier to present relevant evidence on this issue, violate the Board's statutory duty to investigate or deny the carrier due process, under the Fifth Amendment of the Constitution?

REASONS FOR GRANTING THE WRIT

I

On this record, the determination below that the National Mediation Board fulfilled its statutory obligation under the Railway Labor Act to investigate the dispute presented to it raises a serious federal question.

There is no doubt that the petitioner has standing to raise the question whether, in the representation dispute involving petitioner's employees, the NMB fulfilled its statutory obligation to investigate that dispute, and that the Courts have jurisdiction to review Board action for the

purpose of answering that question.[3] *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965) (*"Railway Clerks"* or *"ABNE"*); *International In-Flight Catering Co.* v. *NMB*, 555 F. 2d 712, 719 (9th Cir. 1977). In concluding that "the Board did undertake to 'investigate' the dispute and to designate who might participate in the election" the Court of Appeals pointed to the following facts (Pet., A-15):

> 1. The Board requested and received from SMB a list of 68 qualified pilots and co-pilots;
>
> 2. The NMB Mediator discussed with carrier representatives the eligibility of two particular employees;
>
> 3. After the meeting, SMB submitted a revised list of eligible employees omitting the two who had been discussed;
>
> 4. The NMB Mediator subsequently requested information about the work assignments and duties of three other specified employees, Brandon, Reeves, and Baxter;
>
> 5. SMB submitted a letter explaining the work of those three employees;
>
> 6. During the election period, the Board notified SMB that two more employees had been ruled ineligible; but

3. *Cf. International Association of Machinists* v. *NMB*, 425 F. 2d 527, 534-36 (D.C. Cir. 1970) and *Airline Dispatchers Ass'n* v. *NMB*, 189 F. 2d 685, 688-89 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951), for the impact of the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, on jurisdiction to review decisions by the Board.

7. Contrary to what it did in respect of Brandon, Reeves, and Baxter, the Board did not request information from SMB about employees Barber, Milner, or Worden, nor did it inform SMB that their eligibility was contested.

On those facts, the Court of Appeals said that it agreed with the district court that "Plaintiff appears to be challenging the quality and result of that investigation, focusing upon certain allegedly erroneous resolutions of voter eligibility made by the Board" (Pet., A-15). Respondent IBT also says "the petitioner's contention that the Board's investigation was insufficient rests on narrow, particularized facts concerning the purported voting ineligibility of three individuals and the Board's examination of their status", and, further, that petitioner, in effect, requests review of "discretionary administrative action turning on the agency's assessment of essentially factual issues" (Resp. Br. in Opp., 11, 14).

The difficulty with both the court's conclusion and the respondent's statement of the issue is that the record incontestably does not show any facts upon which the Board arrived at its post-election conclusion that the work duties of the three individuals made them ineligible to vote as pilots. This Court is not being asked to review the correctness of a finding made from certain facts. The Court is being asked to review a determination that an investigation was made concerning eligibility of three particular employees when the record shows that the investigation was confined to the qualifications of other employees. In short, the question is whether the Board has fulfilled its statutory

obligation to conduct an investigation, an obligation which this Court has described as "a duty to make such investigation as the nature of the case requires," *Railway Clerks,* 380 U.S. at 662 (footnote omitted), when nothing in the record shows that the Board had any facts[4] with respect to the three individuals whom it ruled ineligible to vote.

Apparently the Court of Appeals, too, was concerned with the rationality of a determination that an administrative record, showing examination of facts with respect to the eligibility of some employees and no facts with respect to others, was sufficient to establish that a proper investigation had occurred with respect to those others. The court, having recited the facts listed above, on which it concluded that the requisite investigation had indeed occurred, nevertheless went on to refer to a post-election letter from the Board to SMB. That letter states the conclusion that Barber and Milner each function "as an assistant to the chief pilot" and the additional conclusion that Worden "performs non-pilot duties" (Pet., A-16), despite a proffer of evidence to the contrary by the carrier (R., 42). Nothing in the letter indicates either the facts on which those conclusions were based, their source, or whether the Board had any such facts prior to the election (R. 44-48).

Nevertheless, because of that conclusory letter, empty of any reference to an administrative record of evidence sup-

4. To the incontestable extent that the Board's action is reviewable in accordance with the *Railway Clerk's* case, that review must be based "on the full administrative record that was before the . . . [agency] at the time . . . [it] made . . . [its] decision." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420 (1971) (Footnote omitted). So far as the record here discloses, there was no administrative record on the job duties of the three men ruled ineligible.

porting the conclusions, the Court of Appeals said that this case is like *WES Chapter, Flight Engineers' International Ass'n* v. *NMB,* 314 F.2d 234 (D.C. Cir. 1962). It quoted from that decision the statement that the appellant was "asking for a different solution to a mixed factual and legal issue which has been solved by the Board in a manner not clearly contrary to its statutory, including its rule-making, authority" (Pet., A-17).

The opinion in *WES Chapter* makes clear that the facts on which the Board made its decision were known and that indeed, there, appellant was arguing for a different conclusion from those facts. Since there was an administrative record of those facts, the appellant there could not have successfully asserted that the Board had not investigated the dispute, although that ground for assertion of jurisdiction to review had not yet been formulated by *Railway Clerks.*

The challenge here is to the making of a dispositive eligibility determination without any record of the facts on which that determination was made.[5] If such deter-

5. In *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R.R.* v. *Missouri-Kansas-Texas R. Co.,* 320 U.S. 323 (1943), a companion case to *Switchmen's Union* v. *NMB,* 320 U.S. 297 (1943), this Court called attention to the duty of the Board to make eligibility determinations by referring (at 320 U.S. 336 n.11) to *Brotherhood of Railroad Trainmen* v. *NMB,* 88 F.2d 757 (D.C. Cir. 1936). In that case, the Court of Appeals ordered the NMB to give the contesting employees and union "a full hearing and then to reach a decision based only on evidence adduced at the hearing and supplemented by a finding of facts on which it rests its conclusion." 88 F.2d at 761. The Court of Appeals said "it is obvious that the Board acted in this dispute without affording appellants any real hearing, and this, it is needless to say, was the sort of arbitrary action which no court—when its jurisdiction is invoked—can approve." *Id.* Granting that a union and, perhaps, employees are parties to a representation dispute and thus entitled to a full hearing on eligibility issues, does the failure of the Board to have any administrative record on the job duties of employees it has ruled ineligible to vote nevertheless qualify as an "investigation" because the carrier, as a non-party, is not entitled to a full hearing?

(footnote continued on next page)

minations are indeed sufficient to satisfy the Board's statutory obligation to investigate issues presented to it in a representation dispute, all rail and air carriers are justifiably concerned that they may be ordered to recognize and bargain with representatives of their employees whose election may be the result of an eligibility list in which employees are improperly included or from which they have been improperly excluded.

The Court of Appeals disavowed any difference with the decision of the Ninth Circuit in *International In-Flight Catering Co.* v. *NMB,* 555 F.2d 712 (1977). Both courts agree that a representation determination by the Board may be set aside if that determination has been made without the investigation required by the statute. To the extent, however, that the Eighth Circuit has applied that principle by defining a non-investigation as an investigation, it is in conflict with the decision of the Ninth Circuit which declined to accept the Board's mere statement that it had conducted an investigation when it appeared that the Board had failed to investigate an important issue tendered to it.

II

The determination below that a carrier has no constitutional right to notice and opportunity to be heard in representation matters involving its employees which may seriously affect the carrier's property and liberty presents the substantial constitutional question of denial of due process under the Fifth Amendment.

A. This Court has preserved the question of the scope of the carrier's rights under the due process clause of the U. S. Constitution

Although this Court has held that under the Railway Labor Act carriers are not parties to representation proceedings, *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965), that interpretation of the statute does not answer the question whether carriers have a constitutional right to be heard in proceedings the result of which will have profound effects on the way in which they may do business.[6] In fact, in *Railway Clerks* itself, this Court alluded to the carrier's claim that it was constitutionally entitled to notice and an opportunity to be heard in a proceeding to determine craft or class. The Court held that

6. Petitioner's brief (p. 7) and the brief of the Commuter Airline Association of America (pp. 10-13) detail the restrictions on a carrier which result from the certification of an employee representative.

The statement of the Court of Appeals (Pet. A-19 n.5) that "It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort" cannot mean anything more than that a formal hearing to which the carrier would be a party is not required. The cases make clear that the Railway Labor Act requires an investigation of the dispute, not arbitrary action, and no decision of this Court applying the Fifth Amendment sanctions arbitrary action affecting a carrier's interest.

any such requirement had, in that case, been fulfilled, since the carrier had participated in the proceedings and had extensive opportunity to present facts and argument. (380 U.S. at 667-68)

In *Switchmen's Union* v. *NMB,* 320 U.S. 297 (1943), this Court said "*[a]ll constitutional questions aside,* it is for Congress to determine how the rights which it creates [under the RLA] shall be enforced." 320 U.S. 301 (emphasis added). In *Railway Clerks,* again, the Court said "we cannot say that the [carrier's] interest rises to a status which requires the full panoply of procedural protections." 380 U.S. 667. This Court, therefore, has not yet decided the *minimum* procedural protections to which a carrier is entitled under the Fifth Amendment in representation proceedings under the Railway Labor Act, particularly in proceedings to determine eligibility to vote.

B. A carrier is entitled to notice of a dispute and the opportunity to be heard prior to decision on eligibility questions about its own employees.

The Court of Appeals decision that SMB had not been denied due process relied heavily upon the following language from *Railway Clerks,* 380 U.S. 666-67:

> Nor does the Act require that United be made a party to whatever procedure the Board uses to define the scope of the electorate. This status is accorded only to those organizations and individuals who seek to represent the employees, for it is the employees' representative that is to be chosen, not the carriers'. Whether and to what extent carriers will be permitted to present their views on craft or class questions is a matter that the Act leaves solely in the discretion of the Board.

> . . . [W]hile the Board's investigation and resolution of a dispute in one craft or class rather than another might impose some additional burden upon the carrier, we cannot say that the latter's interest rises to a status which requires the full panoply of procedural protections.

The Court of Appeals concluded by saying that the Board "has not failed to satisfy constitutional requirements because it did not further consult SMB or make SMB a party to the proceedings which designated the employee electorate" (Pet., A-18-19).

Apparently the Court of Appeals sought in its conclusion to parallel the conclusion of this Court in the *Railway Clerks* case, suggesting that while there may be a constitutional right to some participation by the carrier in eligibility determinations, just as there is in craft or class determinations, such consultation as the Board had afforded was sufficient. The two cases, however, are not parallel. The record in the *Railway Clerks* case shows that the Board had provided opportunity over a period of many years for the carrier to present all of the evidence and argument which it chose to give on the composition of the craft or class. The carrier knew the issues and presented evidence addressed to them. Here, the carrier did not know that there was any issue as to the eligibility of the three employees in question and was not given any opportunity to present relevant evidence as to their work duties.

Clearly, if the carrier is entitled to due process, the minimum procedure which would satisfy that requirement is one which would give the carrier notice of the issue and opportunity to present relevant facts. For, as this Court has stated in *Memphis Light, Gas & Water Division* v. *Craft*, —— U.S. ——, 98 S.Ct. 1554, 1564 (1978) quoting from *Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976) (emphasis added):

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

By those tests, the serious restrictions on a carrier's freedom to do business which result from certification of a union, the serious risk that such restrictions will be imposed erroneously if the carrier is not aware of questions concerning the employment status of its own employees,[7] and the lack of burden on the Board[8] to seek relevant in-

7. In this case, the Board conceded after the election that it had erroneously included former employee Shaw on the eligibility list. (R., 46-47). That inclusion may have had an effect on the votes of others, since Shaw claimed to have been discharged for union activity. (R., 72-73).

8. In fact, the Board customarily looks to carriers to provide essential information in its representation proceedings. See, generally, the Board's volumes of Determinations of Craft or Class, and, particularly, with respect to eligibility determinations, *Eastern Air Lines, Inc.*, R-4809 (National Mediation Board, July 13, 1978). No persuasive argument can be made, therefore, that an obligation to inform carriers of eligibility questions and to elicit information from them will impede the Board's processes. On the contrary, the Board itself has recognized that that procedure is indispensable to it. The Board should not be permitted to regard such essential procedure as a "courtesy" to the carrier. It was that approach in this case which led the Board to believe that it could make eligibility determinations with respect to three employees without getting any information from the carrier or, so far as it appears, from anyone else.

formation from the one most likely to have accurate information[9] would appear to establish as a minimum requirement of due process that the carrier be made aware of eligibility questions and be given an opportunity to address those questions with facts.

Moreover, the carrier would seem to be entitled to a statement from the NMB showing that the eligibility decisions made are based on a specified record compiled during its investigation. Only in that way can there be assurance that the eligibility determinations are based on an evidentiary record. *See Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970).

In sum, because of a carrier's substantial interest in the outcome of an eligibility dispute regarding its employees, a carrier is entitled under the Fifth Amendment to know the issues being considered, to be heard on those issues, and to have the Board's decision based upon an identifiable record.

Conclusion

The Court of Appeals held that the National Mediation Board complied with its statutory obligation and fulfilled any constitutional requirement with respect to the carrier

9. A representation "dispute" involving air carrier employees typically, as here, involves only one union as party to the proceeding. Employees who may not want the union typically are unrepresented. While the proceeding is an "investigation," not an adversary proceeding, obviously the applicant organization has no interest in presenting facts which would tend to defeat its application. And a Justice of this Court took note of the Board's "mistaken belief that its duty is to encourage collective representation in the airline industry" (380 U.S. at 677). Due process in the protection of the carrier's interest in a fair and impartial investigation would seem to require that the carrier be given an opportunity to present relevant facts.

in making its eligibility determinations. The Court, however, concludes by describing the results of the Board's procedures and actions as the "unilateral and arbitrary imposition of a union" on the carrier. Adherence to the intimations in this Court's decisions of what the statute and Constitution require could not possibly bring about such a result. The writ of certiorari, therefore, should be granted so that this Court can assure that determinations made in representation proceedings which fundamentally affect carrier operations are lawfully made in accordance with standards mandated by the statute and Constitution, and that safeguarding of the carrier's legitimate interests is not dependent merely upon the Board's "courtesy".

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